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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

DAVID G. DONOVAN, *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, in his official  
capacity as President of the United  
States of America, *et al.*,

Defendants.

)  
) **CASE NO. 4:21-cv-5148-TOR**

)  
) **PLAINTIFFS' RESPONSE  
TO FEDERAL**

)  
) **DEFENDANTS' MOTION TO  
DISMISS PLAINTIFFS'  
SECOND AMENDED  
COMPLAINT**

## I. INTRODUCTION

While surges, variants, vaccination rates, CDC recommendations, treatments, and the *actual efficacy* of the vaccine, have greatly changed in the five months since Plaintiffs filed this action, Plaintiffs continue to face the same imminent threat as they, for medical or religious reasons, continue to resist the mandate to be vaccinated against COVID-19.<sup>1</sup> Although Executive Order (“EO”) 14042 remains enjoined on a preliminary basis nationwide. *Georgia v. Biden*, No. 1:21-CV-163, 2021 WL 5779939, at \*12 (S.D. Ga. Dec. 7, 2021), *appeal pending*, EO 14043 does not, *Feds for Med. Freedom v. Biden*, No. 22-40043, 2022 WL 1043909, at \*7 (5th Cir. Apr. 7, 2022) (vacating preliminary injunction order for lack of jurisdiction).<sup>2</sup> Each Plaintiff is either a federal contractor or a federal employee, subject to the COVID-19 vaccine mandate under EO 14042 or EO 14043, respectively.

Most Plaintiffs have maintained their jobs by obtaining temporary

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<sup>1</sup> “Vaccination” is a moving target, as well as repeated booster shots, have since been recommended. Safer Federal Workforce guidance documents are available at: <https://www.saferfederalworkforce.gov/faq/vaccinations/#:~:text=A%3A%20Yes.,of%20where%20they%20are%20working>. The CDC definition of “fully vaccinated” is available at: [https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fvaccines%2Ffully-vaccinated.html](https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fvaccines%2Ffully-vaccinated.html).

<sup>2</sup> Discussed *infra*.

1 accommodations from their employers. The Government cannot bear its burden and  
 2 show why these accommodations should not become permanent. Other Plaintiffs have  
 3 suffered adverse employment action: Defendants recognize that seven Plaintiffs  
 4 working for Battelle Memorial Institute's Pacific Northwest National Laboratory have  
 5 been terminated or placed on indefinite leave without pay.  
 6

7 Plaintiffs face actual, present injury, as a result of the *ultra vires* orders.  
 8 Independently, no "exhaustion" is required for a RFRA claim. In short, this Court has  
 9 subject matter jurisdiction. Meanwhile, Plaintiffs have safely carried out their jobs  
 10 during the pandemic and desire only to be allowed to continue to do so. Plaintiffs  
 11 respectfully request this Court to deny the motion to dismiss and to allow the case to  
 12 proceed on the merits just as similar claims proceeded in this Court's sister district court.  
 13 *Brnovich v. Biden*, No. CV-21-01568-PHX-MTL (D. Ariz. Feb. 10, 2022) (permanently  
 14 enjoining EO 14042 within the State of Arizona, not appealed by the Government).  
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## 17 **II. MOTION TO DISMISS STANDARD**

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 19 Federal Defendants moved under FRCP 12(b)(1) & 12(b)(6). To defeat a Rule  
 20 12(b)(6) motion, Plaintiff need only plead a claim which is "plausible on its face." *Bell*  
 21 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). On a Rule 12(b)(1) motion, Plaintiffs  
 22 bear the burden to establish subject matter jurisdiction by a preponderance of the  
 23 evidence. *United States ex rel. Solis v. Millennium Pharm., Inc.*, 885 F.3d 623, 625 (9th  
 24 Cir. 2018). Both standards are lower than the likelihood-of-success standard for the  
 25

1 “extraordinary and drastic” remedy of injunction, already granted by several other  
 2 courts on the same legal theory against these same mandates. *See, e.g., Brnovich, supra*  
 3 (permanent injunction); *Feds for Medical Freedom, supra*; *Georgia v. Biden, supra*;  
 4 *Kentucky v. Biden*, 23 F.4th 585 (6th Cir. 2022) *affirming Kentucky v. Biden*, No. 21-  
 5 cv-55, --F.Supp.3d--, 2021 WL 5587446 (E.D. Ky. Nov. 30, 2021); *Missouri v. Biden*,  
 6 No.4:21-CV-1300 DDN, --F.Supp.3d--, 2021 WL 5564501 (E.D. Mo. Nov. 29, 2021).

### 8 III. ARGUMENT

#### 9 A. The Federal Defendants’ Motion under FRCP 12(b)(1) should be Denied 10 because the Court has Subject-Matter Jurisdiction.

##### 11 1. *Plaintiffs Have Standing to Sue.*

12 Several federal Courts have held that no exhaustion of remedies is needed to seek  
 13 a preliminary injunction against vaccine-related adverse employment actions. The Fifth  
 14 Circuit, in a vaccine mandate case under Title VII, expressly held that “plaintiffs in this  
 15 case need not have fully exhausted administrative remedies before seeking a  
 16 preliminary injunction in federal court.” *Sambrano v. United Airlines, Inc.*, No. 21-  
 17 11159, 2022 WL 486610, at \*5 (5th Cir. Feb. 17, 2022). As in that case, Plaintiffs here  
 18 are seeking “to avoid being coerce[d] into getting a vaccine that violates their sincerely  
 19 held religious beliefs and thus *avoid* any adverse employment action.” *Id.* at \*7  
 20 (emphasis in original). As in that case, Plaintiffs have begun the EEOC complaint  
 21 process and are entitled to injunctive relief to preserve the status quo to prevent adverse  
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1 employment action while that process is pending. *Id.* Like those plaintiffs, Plaintiffs  
 2 here are under threat of forced unpaid leave, termination, or other adverse employment  
 3 action. *Id.* Two Plaintiffs have been placed on Administrative Leave without Pay (First  
 4 Amended Complaint ¶¶ 77, 79, 313) one was reassigned (*Id.* ¶ 127). Even those  
 5 Plaintiffs who received some accommodation are under threat of adverse action and at  
 6 least have had their free exercise and privacy rights infringed upon.  
 7

8  
 9 Moreover, the Ninth Circuit has declined “to read an exhaustion requirement into  
 10 RFRA” because “the statute contains no such condition.” *Oklevueha Native Am. Church*  
 11 *of Hawaii, Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012). Indeed, “the Supreme  
 12 Court has reviewed a RFRA-based challenge” without requiring first a religious  
 13 exemption from the statute at issue. *Id.* (citing *Gonzales v. O Centro Espirita*  
 14 *Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006)).  
 15 “Federal Contractors” such as most Plaintiffs “are covered by RFRA when they are  
 16 hired as or by an “instrumentality” of the federal government. *See id.* (citing 42 U.S.C.  
 17 § 2000bb–1(a) (imposing the obligations of RFRA upon the ‘Government’); and citing  
 18 42 U.S.C. § 2000bb–2(1) (defining ‘government’ to include ‘a branch, department,  
 19 agency, instrumentality, and official (or other person acting under color of law) of the  
 20 United States, or of a covered entity’).” *Walden v. Cntrs. for Disease Control &*  
 21 *Prevention*, 669 F.3d 1277, 1291 (11th Cir. 2012).  
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25 In another vaccine-mandate case, the District Court for the Eastern District of

1 Texas found that “exhaustion is futile and will not provide complete relief, and therefore  
 2 the case is justiciable.” *U.S. Navy Seals 1-26*, 2022 WL 34443, at \*7, \*12 (Jan. 1, 2022);  
 3 reaffirmed at --F.Supp.3d---, 2022 WL 1025144, at \*9 (N.D. Tex. Mar. 28, 2022)<sup>3</sup>;and  
 4 see *Muhammad v. Sec’y of Army*, 770 F.2d 1494, 1495 (9th Cir. 1985) (using same test);  
 5 *Hodges v. Callaway*, 499 F.2d 417, 420 (5th Cir. 1974). Recently, the District Court for  
 6 the Southern District of Ohio held that exhaustion was futile, where the Agency had  
 7 “effectively stacked the deck against even those exemptions supported by Plaintiffs’  
 8 immediate commanding officers and military chaplains.” *Dockster v. Kendall*, No.  
 9 1:22-cv-84, at \*18 (March 31, 2022).

12 2. *Plaintiffs’ Claims are Ripe.*

13 Many Plaintiffs have already received letters from their employer agencies  
 14 warning of imminent suspension or termination. First Amended Complaint ¶ 182 (e.g.,  
 15 Kerry Kost was informed he would be terminated if unvaccinated by December 8, 2022,  
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19 <sup>3</sup> The United States Supreme Court’s recent decision addressing *U.S. Navy Seals* did  
 20 not overrule the relevant portion of that case, but only stayed that portion of the decision  
 21 that precluded the Navy from considering vaccination status in making deployment,  
 22 assignment, and other operational decisions. The Fifth Circuit decision still stands with  
 23 respect to injunctive relief preventing termination of the military personnel and the  
 24 reasons behind that decision. See *Lloyd J. Austin, III, Secretary of Defense, et al. v.*  
 25 *U.S. Navy Seals 1-26, et al.*, 595 U.S. \_\_\_\_ (2022).

1 although he was later granted a temporary accommodation through March 18, 2022).  
 2 The Government concedes that some Plaintiffs have suffered adverse employment  
 3 action; moreover, it has not identified any Plaintiff who has not had their right to free  
 4 exercise infringed. As the *Sambrano* Court held, threats which coerce the Plaintiffs to  
 5 relinquish their religious rights require immediate judicial intervention. 2022 WL  
 6 486610, at \*8–9 (5th Cir. Feb. 17, 2022).

8 Notably, in *Austin v. U.S. Navy SEALs 1–26*, Judge Merryday of the Middle  
 9 District of Florida found ripe military plaintiffs’ “pending requests” to appeal religious  
 10 accommodation denials. *Austin v. U.S. Navy SEALs 1–26, v. Austin, et al.*, 8:21-cv-  
 11 2429-SDM-TGW. Judge Merryday, correctly, did not require final agency action.  
 12 Notably, the United States Supreme Court issued limited stays on EO 14043 injunctions  
 13 only to the extent that the plaintiffs’ vaccination status would impact Naval  
 14 “deployment, assignment, and other operational decisions;” for other servicemembers,  
 15 the nationwide injunction remains in place. *Austin v. U.S. Navy SEALs 1–26*, \_\_\_ S. Ct.  
 16 \_\_\_, 2022 WL 882559 (Mar. 25, 2022). Here, Defendants contend that “[t]he Hanford  
 17 Site remains secure regardless of the individual Plaintiffs’ continued employment  
 18 status,” ECF No. 41 at 33, and certainly an injunction against terminating Plaintiffs  
 19 would not reduce the Hanford workforce.

24 3. *A Potential Jurisdictional Issue Based on the CSRA Does Not Apply.*

25 EO 14043 was preliminarily enjoined nationwide by a district court which



1 reached the merits, *Feds for Medical Freedom et al v. Biden*, S.D. Tex., No. 3:21-cv-  
 2 00356, 2022 WL 188329 (S.D. Tex. Jan. 21, 2022); but on April 7, 2022, the Fifth  
 3 Circuit concluded that the Federal employees in that case were subject to the Civil  
 4 Service Reform Act (“CSRA”), and so, under the Fifth Circuit’s statutory analysis, have  
 5 no standing until they go through the CSRA administrative review process, and then  
 6 must bring any claim for review in the Federal Circuit. *Feds for Med. Freedom v. Biden*,  
 7 No. 22-40043, 2022 WL 1043909, at \*7 (5th Cir. Apr. 7, 2022). Although Government  
 8 Defendants have not raised the CSRA argument to this Court, it is jurisdictional and  
 9 candor to the Court requires it be addressed. Respectfully, Judge Barksdale’s dissent in  
 10 that appeal is more compelling than the majority opinion. As she noted: “The EO’s  
 11 enactment, however, does not constitute an adverse action subject to CSRA. The case  
 12 at hand is instead a pre-enforcement challenge to a government-wide policy, imposed  
 13 by the President...” *Id.* at \*17 (J. Hawkins, dissent). Judge Hawkins’ dissent is also well  
 14 reasoned where applying CSRA to pre-enforcement actions defeats the purpose of the  
 15 act itself. Under the majority’s theory, Federal employees must engage in CSRA’s  
 16 remedies, and then, if unsuccessful, *return* through the same process. That multiplies  
 17 proceedings, it does not streamline them.

18  
 19 Moreover, regardless of how this Court may view that issue, the Fifth Circuit’s  
 20 holding applies only to the six Plaintiffs in this case who are direct employees of the  
 21 Dept. of Energy, as CSRA applies only to Federal employees. *See Thompson v. Merit*



1 *Sys. Prot. Bd.*, 421 F.3d 1336, 1338 (Fed. Cir. 2005). Because this Court does have  
 2 jurisdiction, it should be guided by the reasoning on the merits of the District Court in  
 3 *Feds for Medical Freedom*. And, again, the Government concedes that some Plaintiffs  
 4 have been injured; the case should not be dismissed in full on this basis.  
 5

6 **B. The Federal Defendants’ Motion under FRCP 12(b)(6) should be Denied**

7 **Because the EOs are Unauthorized, Ultra Vires, and Unconstitutional.**

8 1. *The FPASA does not authorize EO 14202.*  
 9

10 “As your President, I’m announcing tonight a new plan to require more  
 11 Americans to be vaccinated, to combat those blocking public health.”<sup>4</sup> To achieve his  
 12 goal of requiring vaccinations and combatting “those who block public health,” on  
 13 September 9, 2021, President Biden promulgated Executive Order 14043, *Executive*  
 14 *Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees*,  
 15 and Executive Order 14042, *Executive Order on Ensuring Adequate COVID Safety*  
 16 *Protocols for Federal Contractors*, purportedly under the auspices of the Federal  
 17 Property and Administrative Services Act (“FPASA”), 40 U.S.C. § 101 *et seq.*, a statute  
 18 enacted in 1949 to streamline the management of federal property.  
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23 <sup>4</sup> Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021),  
 24 [https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-](https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/)  
 25 [by-president-biden-on-fighting-the-covid-19-pandemic-3/](https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/).

1 The EOs are manifestly not about managing federal property. They mandate the  
 2 entire federal and civilian workforce to be vaccinated against COVID-19 or receive an  
 3 exemption and accommodation from the vaccine. The limited scope of the FPASA has  
 4 been a key issue in litigating the EOs. As Judge Merryday stated in *Florida v. Nelson*,

6 Because the record in this action presents only a threadbare  
 7 and conclusory rationalization that is incommensurate with  
 8 the boundless expansiveness of the executive order's  
 9 application, with the invasiveness of the executive order's  
 10 requirement, and with the intrusion of the executive order into  
 11 a state prerogative with which even Congress likely cannot  
 12 interfere, I join Judges Van Tatenhove, Baker, and Noce in  
*Kentucky, Georgia, and Missouri* in concluding that  
 Executive Order 14042 almost certainly exceeds the  
 President's authority under FPASA.

13 *Florida v. Nelson*, --F.Supp.3d--, 2021 WL 6108948, at \*27 (M.D. Fla. December 22,  
 14 2021) (granting Motion for Preliminary Injunction). While the President may enjoy  
 15 some flexibility under FPASA to avoid disruption in procurement, the absence of any  
 16 basis to think that the EOs will improve the federal or federal contract workforce, or  
 17 its contracting processes discredits the EOs. As Judge Merryday concluded, such a  
 18 complete lack of support "suggests a ruse, a mere contrivance, superficially attempting  
 19 to justify a sweeping, invasive, and unprecedented public health requirement imposed  
 20 unilaterally by President Biden" through EO 14042. *Id.* at 28. Indeed, given the  
 21 overwhelming percentage of vaccinated public employees, the Government cannot  
 22 articulate how draconian enforcement against the few religious objectors remaining  
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1 achieves its purported compelling purpose of continuous procurement.<sup>5</sup>

2 And the United States Supreme Court has repeatedly held that Congress is  
3 expected to “speak clearly” when authorizing executive action of “vast economic and  
4 political significance.” *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021)  
5 (quotations omitted). Basic separation-of-powers concerns forbid the President to  
6 “bring about an enormous and transformative expansion in [his] regulatory authority  
7 without clear congressional authorization.” *Util. Air Regulatory Grp. v. EPA*, 573 U.S.  
8 302, 324 (2014). But that is just what happened here.  
9

11 The Federal Defendants’ reliance upon 40 USC §§ 101(1) and 121 is misplaced.  
12 Section 101 merely states the FPASA’s purpose: to “provide . . . an economical and  
13 efficient *system*” for “(1) *Procuring and supplying* property and nonpersonal services and  
14 performing related functions...” 40 U.S.C. § 101 (emphasis added). “[A]part from [a]  
15 clarifying function, a prefatory clause does not limit or expand the scope of the operative  
16 clause.” *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008); *accord Kentucky*, 23  
17 F.4th at 604. The general statement of legislative intent in Section 101, if it authorizes  
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21 <sup>5</sup> The White House touted “96.5% compliance” months ago on November 24, 2021.  
22 [https://www.whitehouse.gov/omb/briefing-room/2021/11/24/update-on-](https://www.whitehouse.gov/omb/briefing-room/2021/11/24/update-on-implementation-of-covid-19-vaccination-requirement-for-federal-employees/#:~:text=In%20the%2075%20days%20since,at%20least%20one%20COVID%2D19)  
23 [implementation-of-covid-19-vaccination-requirement-for-federal-](https://www.whitehouse.gov/omb/briefing-room/2021/11/24/update-on-implementation-of-covid-19-vaccination-requirement-for-federal-employees/#:~:text=In%20the%2075%20days%20since,at%20least%20one%20COVID%2D19)  
24 [employees/#:~:text=In%20the%2075%20days%20since,at%20least%20one%20COVID%2D19](https://www.whitehouse.gov/omb/briefing-room/2021/11/24/update-on-implementation-of-covid-19-vaccination-requirement-for-federal-employees/#:~:text=In%20the%2075%20days%20since,at%20least%20one%20COVID%2D19)  
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1 anything, does not authorize regulation to procure contractors with an economical and  
 2 efficient workforce—at most, it authorizes regulation to create an efficient and  
 3 economical “scheme or method” for procuring the contractors. *Kentucky v. Biden*, 23  
 4 F.4th 585, 604 (2022) (quoting *Webster’s New International Dictionary* 2562 (2d ed.  
 5 1959)). The word “system” in this statute clarifies that FPASA authorizes regulation  
 6 of the operations of the *government* in contracting, rather than regulation of the  
 7 employees of government contractors. *Id.*

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 9  
 10 The government finds no better support under 40 U.S.C. § 121, which merely  
 11 authorizes the President to “prescribe policies and directives that the President considers  
 12 *necessary to carry out*” FPASA. 40 U.S.C. § 121(a) (emphasis added). “Necessary”  
 13 is a “word of limitation,” generally synonymous with “required,” “indispensable,” and  
 14 “essential.” *Vorheimer v. Phila. Owners Assoc.*, 903 F.3d 100, 105 (3d Cir. 2018)  
 15 (quotations omitted); *accord In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 327  
 16 (4th Cir. 2004). Rather than explaining why a vaccine mandate is required,  
 17 indispensable, or essential to carrying out FPASA, the government offers only a  
 18 “threadbare and conclusory rationalization,” *Nelson*, 2021 WL 6108948 at \*11–12,  
 19 claiming that “The illness and mortality caused by COVID-19 have led to serious  
 20 disruptions for organizations, employees, and contractors across the United States, and  
 21 the federal government is no exception.” Federal Defendants’ Motion to Dismiss at 1.  
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1 Even if FPASA authorized the President to impose requirements to the small  
 2 percentage of remaining dissenters on the internal operations of federal contractor  
 3 employees in the name of economy and efficiency in procurement of contracts, which  
 4 it does not, FPASA is not a “blank check for the president to fill in at his will,” *American*  
 5 *Federation of Labor v. Kahn*, 618 F.2d 784, 793 (D.C. Cir. 1979). There must be a  
 6 “demonstrable relationship” between FPASA’s purpose of ensuring efficiency in the  
 7 contracting process and the mandate. *Liberty Mutual v. Friedman*, 639 F.2d 164, 170–  
 8 71 (4th Cir. 1981). Neither EO 14202 nor any subsequent agency actions “identify any  
 9 instance in which absenteeism attributable to COVID-19 among contractor employees  
 10 resulted in delayed procurement or increased costs.” *Nelson*, 2021 WL 6108948, at \*12.

11 For these reasons, a sister District Court in this circuit permanently enjoined EO  
 12 14042, expressly rejecting the same FPASA-authorization theory proffered by the  
 13 Federal Defendants here. As Judge Liburdi explained:

14 As long as the federal government could articulate *some*  
 15 connection—no matter how tenuous—between the enacted  
 16 policy and the broad goals of achieving economy and  
 17 efficiency in federal procurement, the policy would be  
 18 consistent with the statute...But in reality, the President's  
 19 authority under the Act is not so broad.

20 *Brnovich v. Biden*, CV-21-01568-PHX-MTL, 2022 WL 252396, at \*17 (D. Ariz. Jan.  
 21 27, 2022). Defendant President Biden has not appealed that decision. Similarly, in  
 22 *Kentucky v. Biden*, --- F.4th ----, 2022 WL 43178, \*13 (6th Cir. Jan. 5, 2022), the Sixth  
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1 Circuit denied the federal government's motion for a stay pending appeal of the  
 2 preliminary injunction of the Contractor Mandate, finding that the Federal Defendants  
 3 were unlikely to succeed on the merits because the Procurement Act does not confer  
 4 authority on the President to "impos[e] ... a medical mandate upon the federal-contractor  
 5 workforce." In so ruling, the Sixth Circuit joined the Eleventh Circuit (*Georgia v. Biden*,  
 6 21-14269) in maintaining a District Court's preliminary nationwide injunction on the  
 7 mandate, also founded on the conclusion that the Procurement Act does not authorize  
 8 the President "to direct the type of actions by agencies that are contained in EO 14042."  
 9 *Id.* at 19. In The Contractor Mandate goes "far beyond addressing administrative and  
 10 management issues in order to promote efficiency and economy in procurement and  
 11 contracting, and instead, in application, works as a regulation of public health." *Id.* at  
 12 20. "EO 14042's directives and resulting impact radiate too far beyond the purposes of  
 13 the Procurement Act and the authority it grants to the President." *Id.* at 23.

14 In *Missouri v. Biden*, No.4:21-CV-1300 DDN, --F.Supp.3d--, 2021 WL 5998204  
 15 \*5 (E.D. Mo. Dec. 22, 2021) the District Court ruled that Plaintiffs were likely to  
 16 succeed on their Procurement Act claims because, *inter alia*, "if the statement in EO  
 17 14,042 establishes a sufficient nexus, then the President would be able to mandate  
 18 virtually any public health measure that would result in a healthier contractor  
 19 workforce.... such an interpretation of the President's powers under the [Procurement  
 20 Act] is not consistent with the structure and purposes of the statute." On the same

1 reasoning, EO 14202 was enjoined: “it strains credulity that Congress intended the  
 2 FPASA, a procurement statute, to be the basis for promulgating a public health measure  
 3 such as mandatory vaccination. If a vaccination mandate has a close enough nexus to  
 4 economy and efficiency in federal procurement, then the statute could be used to enact  
 5 virtually any measure at the president's whim under the guise of economy and  
 6 efficiency.” *Kentucky v. Biden*, 2021 WL 5587446, at \*6–7. Indeed, where more  
 7 children die from drowning than COVID, should employees be terminated if they fail  
 8 to provide swim lessons? The same is true for automobile accidents, is a seatbelt ticket  
 9 appropriate grounds for termination? An unhealthy diet or lack of exercise?  
 10  
 11

12 And, in *Feds for Medical Freedom et al v. Biden*, S.D. Tex., No. 3:21-cv-00356,  
 13 Judge Brown specifically ordered the government is “enjoined from implementing or  
 14 enforcing Executive Order 14043 until this case is resolved on the merits.” In that case,  
 15 the Court found a likelihood of success that vaccination is not workplace conduct,  
 16 relying upon the recent Supreme Court decision *Nat'l Fed'n Indep. Bus. v. OSHA*, 595  
 17 U.S. —, 142 S.Ct. 661, — L.Ed.2d — (2022). *Feds* at \*5. “[T]he Supreme Court  
 18 has expressly held that a COVID-19 vaccine mandate is not an employment regulation.  
 19 And that means the President was without statutory authority to issue the federal-worker  
 20 mandate. *Feds* at \*6. That Court also rejected the Federal Defendants’ bare assertion  
 21 that the President can so regulate under Art. II of the Constitution. *Id.*  
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The Federal Defendants are of course aware of this authority; in addition, seeking



1 to preserve party and judicial resources, Plaintiffs have brought these cases to the  
 2 attention of the Contractor Defendants and offered, on multiple occasions, to stipulate  
 3 to a stay of these proceedings while those cases are on appeal if the Contractor  
 4 Defendants will agree to not take adverse employment action against Plaintiffs  
 5 meanwhile. The Contractor Defendants have refused. Their refusal further demonstrates  
 6 that Plaintiffs have standing – they are still threatened with imminent adverse  
 7 employment action despite the nation-wide injunctions.  
 8

9  
 10 2. *The EOs are unlawfully promulgated due to failure to publish.*

11 When the President issued the EOs, he failed to ensure that proper notice and  
 12 comment channels were used and violated the sixty-day publication requirement for  
 13 procurement policies under 41 U.S.C. § 1707(a)(1). When a “procurement policy,  
 14 regulation, procedure, or form” relates to the “expenditure of appropriated funds” and  
 15 either has “a significant effect beyond the internal operating procedures of” the issuing  
 16 agency or “a significant cost or administrative impact on contractors or offerors,” it  
 17 must go through the sixty-day notice and comment period. 41 U.S.C. § 1707(a)–(b).  
 18 Nor does the “urgent and compelling circumstances” exception under § 1707(d) apply.  
 19 The government first tried to publish the EOs on September 28, 2021 but failed to  
 20 complete notice and comment expeditiously. *See* 86 Fed. Reg. at 53961. The  
 21 government then republished on November 16, 2022, restarting the sixty-day notice and  
 22 comment period. 86 Fed. Reg. 64418-25. Delay caused by the government’s own  
 23  
 24  
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1 mistakes cannot create the circumstances justifying good cause. *See Nat. Res. Def.*  
 2 *Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 114 (2d Cir. 2018).

3 3. *The Contractor Mandate (EO 14202) violates the Tenth Amendment.*

4 As held in *Louisiana v. Biden*, No. 21-cv-3867, 2021 WL 5986815, at \*7 (W.D.  
 5 La. Dec. 16, 2021), there is a “palpable conflict” between the Contractor Mandate and  
 6 the Tenth Amendment. The Tenth Amendment reserves to the States powers not  
 7 delegated to the United States by the Constitution. Congress cannot invoke the  
 8 Commerce Clause to compel vaccination because “[a] person’s choice to remain  
 9 unvaccinated and forgo regular testing is noneconomic inactivity. . . . The Commerce  
 10 Clause power may be expansive, but it does not grant Congress the power to regulate  
 11 noneconomic inactivity traditionally with the States’ police power.” *BST Holdings,*  
 12 *L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, 617 (5th Cir. 2021);  
 13 *United States v. Lopez*, 514 U.S. 549, 584 (Thomas, J., concurring) (“[W]e always have  
 14 rejected readings of the Commerce Clause . . . that would permit Congress to exercise  
 15 a police power.”) Because vaccination requirements are matters traditionally reserved  
 16 to the States, President Biden’s EOs violate the Tenth Amendment.  
 17

18 4. *The EOs offend separation of powers.*

19 Were FPASA read as broadly as the Federal Defendants urge, it would contain  
 20 no limiting principle and thus would violate the nondelegation doctrine. When Congress  
 21 vests decision-making authority in an agency, “Congress must ‘lay down by legislative  
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1 act an intelligible principle to which the person or body authorized to [act] is directed  
2 to conform.” *Whitman*, 531 U.S. at 472.

3 5. *The EOs are arbitrary and capricious under the APA.*

4  
5 The Sixth Circuit Court of Appeals held that EO 14202 gave rise to claims under  
6 5 U.S.C. § 702. *Kentucky v. Biden*, --- F.4th ----, 2022 WL 43178 \*11 (6th Cir. Jan. 5,  
7 2022), (denying motion for a stay of preliminary injunction of EO 14202). A court must  
8 “hold unlawful and set aside agency action” that is “arbitrary [or] capricious.” 5 U.S.C.  
9 § 706(2)(A). This standard “requires that agency action be reasonable and reasonably  
10 explained.” *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021); and see  
11 *Sackett v. E.P.A.*, 566 U.S. 120, 130 (2012) (“The APA’s presumption of judicial review  
12 is a repudiation of the principle that efficiency of regulation conquers all.”). The EOs  
13 are final agency action subject to APA review, because (1) they “mark the  
14 consummation of the agency’s decision-making process” and (2) have “legal  
15 consequences” and determine “rights and obligations.” *Louisiana v. Biden*, 543 F. Supp.  
16 3d 388, 408 (W.D. La. 2021) (citing *U.S. Army Corps of Engineers v. Hawkes Co.*, 136  
17 S. Ct. 1807, 1813 (2016)). Plaintiffs lack any adequate alternative remedy to challenge  
18 this final agency action because alternatives to judicial review would impose  
19 “prohibitive costs, risk, and delay.” *Hawkes Co. v. U.S. Army Corps of Engineers*, 782  
20 F.3d 994, 1001 (8th Cir. 2015).  
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1           6.       *The EOs violate Plaintiffs’ Free Exercise rights under RFRA.*

2           The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.*, “was  
3 designed to provide very broad protection for religious liberty.” *Hobby Lobby*, 573 U.S.  
4 682, 706 (2014). As noted by Judge Steve Merryday in his order Granting Preliminary  
5 Injunction: “Specifically, *Hobby Lobby* confirms that ‘RFRA did more than merely re-  
6 store the balancing test used in the *Sherbert* line of cases; it provided even broader  
7 protection for religious liberty than was available under those decisions.’” *Austin v. U.S.*  
8 *Navy SEALs 1–26*, citing: *Hobby Lobby*, at 695 n.3; *Holt v. Hobbs*, 574 U.S. 352, 859–  
9 60 (2015) (finding that RFRA “provide[s] greater protection for religious exercise than  
10 is available under the First Amendment.”) “Government shall not substantially burden  
11 a person’s exercise of religion even [by] a rule of general applicability,” unless the  
12 Government “demonstrates that application of the burden to the person (1) is in  
13 furtherance of a compelling governmental interest; and (2) is the least restrictive means  
14 of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(a), (b).  
15 Because RFRA “provides greater religious protections than the First Amendment, any  
16 claim under this Act also favors judicial review.” *Navy SEALs 1–26*, --F. Supp. 3d---,  
17 2022 WL 34443, at \*7. The burden of proof is on the Government. And the Government  
18 cannot bear its burden to show that the temporary accommodations afforded some  
19 Plaintiffs could simply be made permanent.

20           The Executive Orders cannot survive this statutory strict scrutiny. “And, how  
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could they? Very few scenarios paint a bleaker picture than giving up your livelihood in order to follow your religious beliefs.” *Air Force Officer v. Austin*, No. 5:22-CV-00009-TES, 2022 WL 468799, at \*9 (M.D. Ga. Feb. 15, 2022). The government burdens religion when it “put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.” *Thomas v. Rev. Bd. Of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Under the motion to dismiss standard, the Federal Government cannot meet its burden, where natural immunity has been disregarded and, given the inefficacy of the vaccines against current variants, masking and testing may be at least as effective and less restrictive than a vaccine that cannot be taken off at the end of the workday like a mask.

#### 7. *The EO Offend Equal Protection*

The Equal Protection Clause prohibits the government from drawing “arbitrary distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objection.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Arbitrary lines have been drawn between those with natural immunity with religious objections and those who are vaccinated. And, based on the latest science, those with natural immunity may be better protected. Strict scrutiny applies when those lines are drawn against a suspect class *or* when a fundamental right is at stake and is the codified test under RFRA.

#### 8. *Plaintiffs’ Bivens claims are properly pled.*

1 Plaintiffs agree that 42 USC 1983 does not allow claims against the Government  
 2 itself, but Plaintiffs properly pled claims against the Federal Defendants in their  
 3 personal capacities for their official acts. *Bivens v. Six Unknown Named Agents of*  
 4 *Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The President has absolute  
 5 immunity from *Bivens* liability, but Mrs. Granholm and Mr. Vance do not.  
 6

#### 7 IV. CONCLUSION

8 For the reasons set forth above, Plaintiffs respectfully request that this Court  
 9 DENY Federal Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint  
 10 and allow this case to proceed to the same merits decided in Arizona and elsewhere.  
 11

12 **DATED** this 8th day of April 2022.

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 8, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States District Court District of Washington by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have I served a copy of the foregoing upon all Defendants via legal messenger.

DATED this 8th day of April 2021.

/s/ Nathan J. Arnold

Nathan J. Arnold, WSBA No. 45356